

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1818

Cir. Ct. No. 2012CV4096

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

QUINCY NERI,

PLAINTIFF-APPELLANT,

RODNEY RIGSBY AND Q'S ART FACTORY LLC,

PLAINTIFFS,

V.

**TIMOTHY M. BARBER, LORI M. LUBINSKY, AXLEY BRYNELSON LLP,
FRANKENMUTH MUTUAL INSURANCE COMPANY, ANTHONY ANZELMO,
PETERSON, JOHNSON AND MURRAY, RURAL INSURANCE COMPANY,
CATHLEEN A. DETTMAN, KEVIN PALMERSHEIM, HALEY PALMERSHEIM
S.C., CARLEY PEICH-DEISLING, BARRETT J. CORNIELLE, DAVID
J. PLINER, CORNIELLE LAW GROUP LLC, GENERAL CASUALTY
COMPANY OF WISCONSIN, ARCHITECTURAL BUILDING ARTS, INC.,
MELINDA MONROE, STEVE LARSON, LESLEY SAGER, SAGER DESIGNS,
AMY RADSPINNER, AMY RADSPINNER DESIGN LLC, ERIC FERGUSON
AND WHITE SCHOOL STUDIOS,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed and cause remanded with directions.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Quincy Neri appeals the dismissal of her complaint and judgments imposing sanctions for filing a frivolous action. Neri contends that her complaint should not have been dismissed because it stated valid claims.¹ We conclude that Neri's complaint failed to state any cognizable claim and had no reasonable basis in law. Accordingly, we affirm. Additionally, we grant the motion by the respondents for sanctions for a frivolous appeal.

Background

¶2 This action stems from Quincy Neri's claim that she created an art glass sculpture for installation in the home of Linda Hughes and identified a valuable mural in Hughes' ceiling. Neri has claimed a copyright in the glass sculpture and that others have infringed on that copyright, and has pursued both federal and state lawsuits arising from those facts. In this case, Neri claims damages based on statements and actions by the defense attorneys during the course of Neri's federal copyright lawsuit and the respondents' actions in connection with remodeling the Hughes home.² Specifically, Neri complains that

¹ While Neri asserts many wrongs against her, the only coherent argument we decipher in her brief is an assertion as to the merits of the claims in her complaint. Accordingly, we limit our discussion in this opinion to that issue. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).

² Rodney Rigsby was also a plaintiff below, but has not appealed the circuit court's decision.

the defense attorneys in Neri's federal copyright action made defamatory statements about Neri in court filings and in an email sent by an attorney to Neri and copied to other attorneys; that Neri identified a valuable mural in Hughes' ceiling but was not hired to remove it or otherwise compensated for the discovery; that Neri was not hired to rebuild Hughes' ceiling to accommodate the glass sculpture; and that photographs of the glass sculpture were posted on the internet and used to win an interior design award, without crediting Neri. The circuit court dismissed Neri's complaint for failing to state a claim and imposed sanctions. Neri appeals.

Discussion

¶3 When we review an order dismissing a complaint for failure to state a claim, we assume the truth of the facts asserted in the complaint. *See Putnam v. Time Warner Cable of Se. Wis.*, 2002 WI 108, ¶11, 255 Wis. 2d 447, 649 N.W.2d 626. ““Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of the complaint is improper.”” *Id.* (quoted source omitted). Because the facts asserted in Neri's complaint do not set forth any cognizable claim, the complaint was properly dismissed.

¶4 Neri asserts first that she has stated a claim for defamation. Neri's complaint states that the defense attorneys in Neri's federal copyright action made the following false statements about Neri³: that Neri had engaged in “excessive, unusual, harassing and unjustifiable litigation”; that Neri was an “amateur copyright troll[]” who was “trying to make money by filing baseless copyright

³ Because Rodney Rigsby has not appealed, we do not address statements in the complaint that are specific to Rigsby.

suits and extorting settlement payments from businesses”; that an award of attorney fees against Neri was necessary because otherwise Neri would “continue to harass [the respondents] in the misguided hope that eventually someone will pay her something to go away”; that attorney fees were necessary “to discourage such lawsuit extortion against legitimate businesses that have done nothing wrong except had the misfortune to come in contact with ... Neri”; that Neri had “engaged in a pattern of harassment throughout [the federal] litigation, in which [she had] routinely appeared at various defendants’ and third party homes and places of business, demanding[] both money and documents”; and that “[w]hen one views the circumstances of this case taken as a whole, it is clear that Neri ... [has] brought this suit as an opportunistic way to try and make money through litigation.” Neri’s complaint alleged that the attorneys published their statements to others in court filings in Neri’s federal copyright lawsuit, and in an email sent to Neri and other attorneys during that same time period. Additionally, Neri contends that all the respondents are liable for defamation for posting photographs of the glass sculpture on the internet and using the photographs to apply for an interior design award without identifying Neri as the creator of the sculpture.

¶5 A defamation claim requires the following elements:

(1) a false statement; (2) communicated by speech, conduct or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one’s reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her.

Ladd v. Uecker, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216. Thus, to state a claim for defamation, a complaint must set forth an unprivileged statement by the defendant.

¶6 We have explained that “statements made in judicial proceedings are absolutely privileged” and that “an absolute privilege gives ‘complete protection.’” *Id.*, ¶15 (quoted source omitted). We have further explained that attorneys are “‘absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which [the attorney] participates as counsel, if it has some relation to the proceeding.’” *Rady v. Lutz*, 150 Wis. 2d 643, 648, 444 N.W.2d 58 (Ct. App. 1989) (quoted source omitted). “The absolute privilege to defame in the course of judicial or quasi-judicial proceedings is not limited to statements during trial, but may extend to steps taken prior to trial such as conferences and other communications relevant to the proceeding,” including letters sent to interested parties. *Id.* at 649.

¶7 Here, all of the statements Neri complains were defamatory were made by the defense attorneys in the course of Neri’s federal copyright case and were related to the litigation. Accordingly, those statements are not actionable. *See Ladd*, 323 Wis. 2d 798, ¶13 (“Statements ‘pertinent or relevant to the case’ that are made in the course of judicial proceedings are absolutely privileged and insulate the speaker from liability.” (quoted source omitted)). The additional facts that Neri argues give rise to a defamation claim—that the respondents posted photographs of the glass structure on the internet and used photographs of the glass structure to enter an interior design award, without crediting Neri as the artist—simply do not set forth a statement by the respondents, and thus do not support a claim for defamation.

¶8 Next, Neri contends that she has stated a claim for invasion of privacy. This argument is premised on the idea that displaying Neri’s glass sculpture on the internet is the equivalent of displaying her name or image and,

thus, the respondents violated Neri's privacy by displaying the sculpture to others. This is simply not the law on invasion of privacy. Under WIS. STAT. § 995.50(2)(b) (2011-12),⁴ "invasion of privacy" includes "[t]he use, for advertising purposes or for purposes of trade, *of the name, portrait or picture of any living person*, without having first obtained the written consent of the person" (emphasis added). A glass sculpture is not a living person.

¶9 Alternatively, Neri asserts that she has stated a claim for invasion of privacy because posting photographs of the glass sculpture on the internet disclosed Neri's private artwork to the public, which would be highly offensive to a reasonable person. *See* WIS. STAT. § 995.50(2)(c). This argument, too, lacks arguable merit. Under the facts in Neri's complaint, Neri created the glass sculpture for installation in the Hughes home where any reasonable person would understand it would be visible to all who visited the home. Neri's claim that allowing others to see the sculpture invaded her private life makes no sense.

¶10 Neri's next argument is that she stated a claim for fraud. Neri's complaint alleges that the defendants committed fraud by failing to disclose to others that Neri created the glass sculpture in the Hughes home, giving others permission to photograph the sculpture, and using photographs of the sculpture in an interior design award entry. It also appears to assert that the defendants committed fraud by failing to encourage Hughes to hire Neri to remove the mural from the Hughes ceiling and to rebuild the Hughes ceiling.

¶11 A claim of fraud requires the following elements:

⁴ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(1) the defendant made a factual representation, (2) which was untrue, (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false, (4) the defendant made the representation with intent to defraud and to induce another to act upon it, and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

Williamson v. Hi-Liter Graphics, LLC, 2012 WI App 37, ¶13 n.6, 340 Wis. 2d 485, 811 N.W.2d 866. Additionally, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *See* WIS. STAT. § 802.03(2). Thus, a plaintiff must plead “the ‘who, what, when, where and how’” of a fraud claim. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (quoted source omitted).

¶12 Here, Neri’s complaint does not set forth any facts that would support a claim that any defendant made a false representation to Neri that induced Neri to act to her detriment. Rather, Neri’s complaint sets forth vague assertions that the defendants were dishonest in connection with the glass sculpture and the remodeling of the Hughes home.⁵ Neri does not set forth any specific false representation to Neri, nor does she set forth any actual reliance by Neri on an allegedly false statement. Accordingly, Neri has not stated a claim for fraud.

⁵ Neri’s complaint is lengthy and largely incoherent. We do not attempt to set forth all of the complaint’s factual allegations in this opinion. As to Neri’s claims of fraud, Neri sets forth conclusory allegations such as the following: “All ... [d]efendants[] committed fraud from the start of the stealing the mural discovery and removal project for themselves, to claiming ownership of the ceiling re-build, to applying and winning the [interior design] award”; that the defendants entered the award by “using Neri’s art glass sculpture and ceiling design as their own”; that the defendants had “knowledge of the falsity of their statements”; and that “all [d]efendants[] kept Neri completely in the dark of their fraudulent conduct by applying for and winning the [interior design] award using Neri’s creations as their own.” These vague and conclusory allegations are insufficient to support a claim of fraud.

¶13 Neri then asserts that she has stated a claim against the respondent attorneys because Neri’s defamation claims establish that the attorneys violated supreme court rules as to truthfulness and misconduct. It is sufficient for us to note that the preamble to the rules specifically states that the rules are not a basis to impose liability. *See* SCR ch. 20, Preamble: A Lawyer’s Responsibilities. We conclude that Neri’s complaint does not provide any basis to hold the defense attorneys liable for their conduct in defending their clients in federal court.

¶14 Finally, Neri argues that she has stated a claim for “trade libel” or “trade dress” by asserting that the respondents posted photographs of the glass sculpture on the internet with altered coloring. However, trade libel is “the publication of matter disparaging the quality of another’s land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other’s interests in the property.” RESTATEMENT (SECOND) OF TORTS § 626, at 345 (1977). Nothing in Neri’s complaint supports a claim that any of the respondents disparaged Neri’s art. Accordingly, Neri has not stated a claim for trade libel.

¶15 A claim for trade dress requires an allegation that the defendant used the plaintiff’s product’s distinctive mark in commerce. *See Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶¶28-29 & n.31, 261 Wis. 2d 4, 660 N.W.2d 666. Neri has not alleged facts supporting such a claim.

¶16 We turn, then, to the issue of sanctions. The circuit court determined that Neri’s claims against the federal copyright defense attorneys for their actions in the course of defending the federal copyright claim were “clearly the most troubling part of the case.” The court explained: “The law in Wisconsin is clear.

[A]ttorneys and their firms enjoy a privilege that immunizes them from suit when they make statements or take actions in connection with legal proceedings.” The court explained further that “[Neri] simply cannot decide to add to [her] list of culpable parties the lawyers who are retained to represent the parties in the initial lawsuit. This conclusion should have been objectively apparent to [Neri].” The court determined that Neri’s action in connection with adding the attorneys as defendants was so clearly without merit that it appeared “designed to contribute to the vexatious aspect of this lawsuit” and was “indefensible.” Based on those findings, the circuit court determined that sanctions were appropriate in connection with Neri’s claims against the attorneys and, therefore, awarded costs and reasonable attorney fees in connection with defense of those claims.

¶17 While Neri has appealed the circuit court’s judgments imposing sanctions, Neri does not set forth any argument as to why sanctions were improperly imposed in this case. It appears, then, that Neri’s appeal of the judgments for sanctions in this case rests on her argument that her complaint sets forth valid claims against the attorneys. In other words, Neri’s only argument as to sanctions is a challenge to the circuit court’s determination that Neri’s complaint failed to state a claim against the attorneys, a topic we have already addressed.

¶18 We conclude that the circuit court properly exercised its discretion in determining that sanctions were appropriate under WIS. STAT. § 802.05. *See Keller v. Patterson*, 2012 WI App 78, ¶¶20-23, 343 Wis. 2d 569, 819 N.W.2d 841, review denied, 2013 WI 6, 345 Wis. 2d 405, 827 N.W.2d 95. We review a circuit court’s determination as to how much investigation should have been done prior to filing suit for an erroneous exercise of discretion. *Donohoo v. Action Wis., Inc.*, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. We will uphold a

discretionary decision so long as the court ““examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.”” *Id.* (quoted source omitted).

¶19 The court explained that Neri had already pressed her claims in federal court, lost, and pursued relief in state court on the same facts. The court noted that, several months earlier, Neri received a decision in Dane County case number 2013CV75, which detailed that the facts underlying these cases do not give rise to a state law remedy. The court also noted that it appeared that, after losing in federal court, Neri “fell back to cobble together a state law claim” that she hoped “would generate a settlement offer to avoid litigation or the distraction of this litigation.” Additionally, the circuit court explained its determination that Neri’s claims against the defense attorneys were particularly egregious in their lack of any basis in law. The facts before the circuit court and the inadequacy of the complaint supported the circuit court’s exercise of discretion in imposing sanctions under WIS. STAT. § 802.05(3).

¶20 Finally, we address the respondents’ motion for sanctions for a frivolous appeal. The respondents request that we find this appeal frivolous under WIS. STAT. RULE 809.25(3) and enter an order awarding the respondents their attorney fees and costs. The respondents further request that we enter an order barring Neri from suing any of the respondents in relation to the facts of this case until Neri satisfies all judgments and fees entered against her. We agree that that is an appropriate remedy.

¶21 WISCONSIN STAT. RULE 809.25(3)(a) states that, if this court finds an appeal is frivolous, the court “shall award to the successful party costs, fees, and reasonable attorney fees under this section.” In an appeal from a ruling of

frivolousness, we need not determine whether the appeal itself is frivolous before we can award appellate costs and reasonable attorney fees. *Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Rather, if we determine that the claim was properly found frivolous by the circuit court, it is frivolous per se on appeal. *Id.* Because we conclude that the circuit court properly found Neri's claims against the federal defense attorneys frivolous, the part of Neri's appeal asserting the merits of those claims is also frivolous.

¶22 We award costs and attorney fees under WIS. STAT. RULE 809.25 only when we deem an appeal to be frivolous in its entirety. *See State ex rel. Robinson v. Town of Bristol*, 2003 WI App 97, ¶54, 264 Wis. 2d 318, 667 N.W.2d 14. Beyond Neri's argument as to the merits of her claims against the attorneys, the only other coherent arguments in Neri's brief relate to her assertion that her complaint states other claims against the respondents. However, as we have explained, none of Neri's claims in this case have any basis in law. The frivolousness of Neri's claims should have been apparent to her. *See Verex Assurance, Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 735-36, 436 N.W.2d 876 (Ct. App. 1989) (holding that the total lack of legal support for a claim would lead a reasonable party to conclude that assertion of that claim on appeal would be frivolous, and that even pro se appellants are expected to adequately investigate the facts and law). We conclude that Neri's entire appeal is frivolous.

¶23 Under WIS. STAT. RULE 809.25(3)(a), when an appeal is found to be frivolous, we "shall award to the successful party costs, fees and reasonable attorney fees" incurred in litigating the appeal. Accordingly, we remand to the circuit court for a determination of the respondents' costs and reasonable attorney fees.

¶24 “If we determine that an appeal is frivolous, we also have the ability to bar the party in question from commencing further proceedings in this court and in the trial court until the costs, fees, and attorney fees that we award are paid in full.” *Schapiro v. Pokos*, 2011 WI App 97, ¶21, 334 Wis. 2d 694, 802 N.W.2d 204. In light of Neri’s insistence in pursuing the frivolous claims in this case, and in recognition that Neri is currently pursuing two similar appeals—appeal numbers 2013AP713 and 2013AP1112—we determine that sanctions are appropriate here. We believe this strikes the necessary balance between Neri’s right of access to the courts and the respondents’ interest in finality, as well as recognizing “the taxpayers’ right not to have frivolous litigation become an unwarranted drain on their resources and the public interest in maintaining the integrity of the judicial system.” See *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 749, 468 N.W.2d 760 (Ct. App. 1991).

Conclusion

¶25 We affirm the judgments and order of the circuit court and conclude that the respondents are entitled to their costs and reasonable attorney fees on appeal under WIS. STAT. RULE 809.25(3). We remand to the circuit court to determine the proper amount. Further, we bar Neri from commencing proceedings in this court and the circuit court arising from, relating to, or involving the respondents and the facts connected to this case until Neri satisfies the judgments entered against her in this case. The clerk of this court is instructed to return, unfiled, any document submitted by Neri relating to any matter arising from, relating to, or involving the respondents and the facts of this case. On remand, the circuit court shall enter whatever order is necessary to give direction to the clerk of the circuit court relating to this opinion’s prohibition on future filings by Neri. The clerk of this court will resume accepting Neri’s documents for filing if the

documents are accompanied by an order of the circuit court indicating that Neri has paid all of the costs, fees, and reasonable attorney fees awarded in connection with this case.

By the Court.—Judgments and order affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

